

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

77-1218

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P/S

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

United States of America

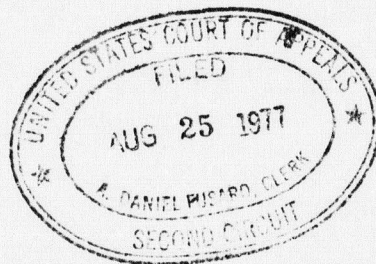
VS.

Daniel Richard Zogbi

Appeal Taken from U. S. District Court
for the District of Vermont

Docket No. CR: 76-79

APPELLANT'S BRIEF



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Issue Presented: Did the Trial Court commit reversible error by allowing into evidence Government's Exhibits No. 2 and No. 3?

Statement of the Case: On February 17, 1977, the Government filed a superseding indictment containing five counts. The trial of this matter commenced on April 5, 1977. During the course of the trial, Count I (Title 18 U.S.C. sec. 2233 and 2) was dismissed by the Trial Court (Tr. Session II p. 14). Count II (Title 18 U.S.C. sec. 641) was also dismissed (Tr. p. 3) as was Count V (Title 18 U.S.C. sec. 371) by the Trial Court (Tr. p. 143). Defendant was convicted of Count III (Title 18 U.S.C. sec. 549) and Count IV (Title 18 U.S.C. sec. 2312 and 2) and was sentenced to one year as to both Counts, execution of sentence suspended with the exception of sixty (60) days which is to be served in a jail type institution, and Defendant was placed on probation for a period of three years to commence upon release from confinement. Sentences to run concurrently with each other.

Statement of the Facts: On July 29, 1976, the Defendant entered the Port of Entry from Canada into the United States at Highgate Springs, Vermont, at which time he was driving a 1976 Pontiac Trans AM Firebird automobile (Tr. p. 12). Upon arriving at the Highgate Port of Entry the automobile was searched and, as a result of the search, was seized by the Government (Tr. p. 13), and was placed in the area known as the impound lot at the Highgate Springs boarder crossing station (Tr. p. 14).

Defendant was charged under Count III of the indictment that on September 23, 1976, he did unlawfully, willfully and knowingly remove the automobile while it was in the custody and control of the United States Customs Service and under Count IV that he did transport the automobile from the United States into Canada, knowing it to have been stolen. To prove that the Defendant had knowingly removed the automobile from Customs, the Government relied on four basic sets of facts. First, the Government placed him in the area of Highgate Springs at the general time that the automobile was discovered missing. Through the testimony of Customs Inspector Joseph Cuzzo it was shown that the Defendant entered the Port of Entry at Champlain, New York, on September 23, 1976, at approximately 12:30 a.m. (Tr. p. 63). Secondly, the Government showed through the testimony of several Government witnesses that on September 26, 1976, the Defendant was observed in the automobile in front of his house in Montreal, Canada. Thirdly, the Government introduced primarily through the testimony of Special Agent Richard F. Mercier that in his presence on October 13, 1976, at the time of his arrest, the Defendant stated to his father, "calm down, some officer must have seen me taking the car," (Tr. p. 127). Finally, the Government introduced evidence to show that the Defendant had the requisite intent, that he had acted willfully and knowingly.

Under Count III it was necessary for the Government to show that the Defendant acted voluntarily and intentionally in removing the automobile from Customs custody, knowing that the automobile was in the custody and control of the United States Customs and

that he knew that he was acting illegally in so removing it. Hughes v. U.S.C.A., Mass 1964, 338 F.2d 651, rehearing den. 340 F.2d 609. Under Count IV, it was again necessary for the Government to show that the Defendant voluntarily and intentionally transported the automobile in foreign commerce with the intent to violate the law and that at the time he knew the automobile was stolen. Kawalewski v. U. S. C.A. Or. 1969, 418 F.2d 118. In other words, under both Counts it was necessary for the Government to show that the Defendant knew the automobile had been seized by the Government. The Government basically attempted to do this through the introduction into evidence of Exhibits No. 2 and No. 3, over objection of the Defendant (Tr. p. 34). Exhibits No. 2 and No. 3 taken together were purportedly proof of the fact that the Government had notified the Defendant that his automobile had been seized and the procedure he must follow to regain possession of it. It was the Government's position that Exhibits No. 2 and No. 3 represented a copy of a letter sent to the Defendant by the Government explaining the above. The Government introduced Exhibits No. 2 and No. 3 through the testimony of Customs Officer Robert K. Cyr (Tr. p. 34). He testified that Exhibit No. 2 is a carbon copy of the letter sent to Defendant showing the date, the file number and the addressee and contains no further information. So, by itself, Exhibit No. 2 is not a true duplicate of the letter supposedly sent to Defendant. Robert K. Cyr testified that what would have been sent to Defendant would have been Exhibit No. 2, which would have contained the further information found in Exhibit No. 3, this Exhibit being merely a form letter (Tr. p. 35).

Argument: The Trial Court committed reversible error by allowing into evidence Government's Exhibits No. 2 and No. 3 and by not requiring that the original letter supposedly sent to Defendant be introduced.

Under Rule 101 of the Federal Rules of Evidence for United States Courts and Magistrates, it is stated as follows:

These rules govern proceedings in the Courts of the United States and before United States Magistrates with the exceptions stated in Rule 1101. United States Code Service, Lawyers Edition, "Federal Rules of Evidence Title 28-Appendix U.S.C.S." The Lawyers Corporation Publishing Company, Rochester, N.Y., p. 7.

and a reading of Rule 1101 clearly indicates that these rules of evidence are applicable to the case of U. S. v. Daniel Richard Zogbi Cr. 76-79 now before the Court.

It is the Appellant's position that when Rules 1001, 1002 and 1003 of the Federal Rules of Evidence Article X are applied to the facts of this case that the Trial Court committed a reversible error by allowing into evidence Government's Exhibits No. 2 and No. 3.

Rule 1002 spells out the general rule with respect to proving the contents of a writing (a letter being defined as a writing under Rule 1001(1)). Rule 1002 reads as follows:

To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by act of Congress. United States Code Service (supra p. 144).

It is true that under 1003 a duplicate under certain circumstances is admissible to the same extent as the original. A case in point is that of Myrick v. United States (CA5) 332 F.2d 279

(1964). In this case a subpoena had been issued to the bank for the production of their records, but instead of bringing the original microfilms of the checks, he brought prints from the same which he identified as having been made from the microfilms. The Appellant Court in upholding the Trial Court cited the case of Williamson v. United States (CA5) 272 F.2d 495 (1960) on p. 282.

A photostat taken from permanent title records and properly identified by the proper custodian is admissible into evidence, it appearing the original records had been destroyed in the ordinary course of business.

Although this case deals generally with Title 28, Sec. 1732, it is cited in the Advisory Committee's Notes to Rule 1003 where it is stated:

Therefore, if no genuine issue exists as to authenticity and no other reason exist for requiring the original, a duplicate is admissible under the rule. This position finds support in the decision, Myrick v. United States 332 F.2d 279 (5 Cir. 1964). No error in admitting photostatic copies of checks instead of original microfilm in absence of suggestion to trial judge that photostats were inaccurate. . . United States Code Service (supra Appendix 6 p. 559).

However, in the Myrick case (supra p. 4) it was clear to the Court that the photostatic copies were exact copies, in other words, duplicates, of the original microfilm, this fact having been testified to by the bank officer. In United States v. Daniel Richard Zogbi Cr. 76-79, the case now before the Court, this is not the case, and Appellant would argue that the Government failed to lay a proper foundation in proving that Exhibits No. 2 and No. 3 were exact duplicates of the letter in question as the

word duplicate is defined under Rule 1001(4) of the Federal Rules of Evidence, which Rule reads as follows:

(4) Duplicate - A "duplicate" is a counterpart produced by the same impression as the original, or from the same matrix, or by means of photograph, including enlargements and miniatures, or by mechanical or electronic re-recording, or by chemical reproduction, or by other equivalent techniques which accurately reproduces the original. United States Code Service (Supra p. 144).

As has been stated on page 3 of the Appellant's Brief, Robert K. Cyr's testimony shows that Exhibits No. 2 and No. 3 taken together do not represent an exact duplicate of the letter in question. Exhibit No. 2 may be to the extent that it is a carbon copy of the heading on the letter that the Government claims was mailed to Defendant, but there is absolutely no evidence to show that Exhibit No. 3, which purportedly contained the body of the letter was made by a process as outlined in Rule 1001(4). In fact, Robert Cyr testified that Exhibit 3 was simply a standard form letter used in similar situations (Tr. p. 35).

Furthermore, Appellant would take the position that even if the Appellate Court should find that Government's Exhibit No. 2 and No. 3, taken together, is a duplicate of the letter in question, that "in the circumstances it would be unfair to admit the duplicate in lieu of the original". United States Code Service Rule 1003(2) (Supra p.). This position is based on the lack of knowledge the testifying witness, Robert Cyr, had with respect to the circumstances surrounding the letter, when weighed against the probable prejudice to Defendant. On direct examination, he testified that he had nothing personally to do with generating

the letter (Tr. p. 34). Furthermore, on cross-examination, Robert K. Cyr testified that he was not the one who made a copy of the letter, but found it in the file, that he did not personally mail the letter and in fact it is clear from his testimony that he had never seen the original letter and there was no testimony from anyone who had either seen the original letter or compared the copy to it. As a result, there is little evidence that authenticates that Exhibits No. 2 and No. 3 were true copies of the original letter or that the original letter was ever mailed. It would also be for this reason that Appellant would further argue Exhibits No. 2 and No. 3 would not be admissible under Title 28 U.S.C.A. 1733. U. S. v. Hudson, C.A. Cal 1972, 479 F.2d 251 cert. den. 94 S.Ct. 377, 414 U. S. 1012, 38 L. Ed.2d 250 (1972). It would further appear as will be discussed, that the prejudicial effect to Defendant of allowing into evidence the Exhibits in question is substantial.

The question now arises as to whether the erroneous admission into evidence of Exhibits No. 2 and No. 3 constituted prejudicial error as stated in Blackwell v. United States (CA8) 244 F.2d 423 (1957) p. 431.

Errors which do not affect substantial rights will be disregarded, Rule 52(a) Rules of Criminal Procedure 18 U.S.C. The Test for determining whether error is prejudicial is set out in Kotteakos v. United States, 328 U.S. 750, 765, 66 S.Ct. 1239, 90 L.Ed. 1557. The error is prejudicial unless the reviewing court can say with fair assurance that the judgment of the jury was not swayed by the error. In Davis v. United States, 8 cir., 229 F.2d 181, we quote with approval from Williams v. United States, 8 cir., 265 as follows (229 F.2d at page 187):

"Whether prejudice results from the erroneous admission of evidence at a trial is a question that should not be considered abstractly or by way of detachment. The question is one of practical effect, when the trial as a whole and all the circumstances of the proof are regarded."

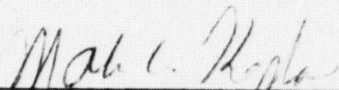
Appellant maintains that this error was prejudicial to him. As stated on page 3 of Appellant's Brief, the Government relied substantially upon Exhibits No. 2 and No. 3 to show that Defendant knew the automobile had been seized and therefore committed the criminal conduct knowingly and willfully. The only other evidence introduced by the Government to prove this basic element of the offenses alleged in Count III and Count IV was through the testimony of Special Agent Frank J. Kopeski, Jr., who on direct testimony testified that he informed the Defendant the car was being seized (Tr. p. 15). However, on cross-examination he testified that he could not recall any other comments he made to the Defendant and could not remember if he explained to the Defendant what was meant by the fact the car had been seized (Tr. p. 16). He also testified that he did not know whether the Defendant was even given the standard receipt which shows merchandise is under seizure (Tr. p. 18).

The importance of Government's Exhibits No. 2 and No. 3 in convincing the jury of the Defendant's knowledge in this matter becomes more apparent when one looks at the circumstances under which the automobile was maintained by the Customs Service. Frank J. Kopeski, Jr., testified that he did not place any sticker on the automobile indicating that it had been seized (Tr. p. 22) and in fact there was no testimony to show that a sticker was ever

placed on the automobile. Beyond this, the automobile was parked in a grassed area, which was not fenced in (Tr. p. 14), and as Robert K. Cyr testified, an individual who was not familiar with the impound area would not be able to tell by looking at the automobile parked there that it was under seizure.

Conclusion: For the reasons stated above, the judgment finding the Defendant guilty of Count III and Count IV should be reversed and the case should be remanded for a new trial.

Respectfully submitted,



MARK A. KAPLAN, Attorney for the
Appellant-Defendant

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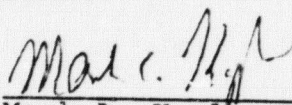
Docket No. Cr. 77-79

V.

DANIEL RICHARD ZOGBI

CERTIFICATE OF SERVICE

I, Mark A. Kaplan, hereby certify that on the 27th day of July, 1977, I made service of Appellant's Brief upon Jerome O'Neil, Assistant U.S. Attorney, by depositing a copy of the same in the U.S. Mail, postage prepaid, addressed to him at his office in Burlington, Vermont.



Mark A. Kaplan, Attorney
for Appellant.